PART IX

REGULATORY PRESUMPTIONS

A. ***20 C.F.R. §727.203 INTERIM PRESUMPTION***

2. REBUTTAL OF THE INTERIM PRESUMPTION GENERALLY

c. Section 727.203(b)(3)

Subsection (b)(3) allows the party opposing entitlement to rebut the interim presumption by establishing that the miner's total disability did not arise in whole or in part out of coal mine employment. In ***Borgeson v. Kaiser Steel Corp.***, 12 BLR 1-169 (1989)(***Borgeson III***), the Board overruled its prior holdings in ***Borgeson v. Kaiser Steel Corp.***, 8 BLR 1-312 (1985)(en banc) (***Borgeson II***) and ***Shaw v. Bradford Coal Co.***, 7 BLR 1-462 (1984), and held that to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any relationship between the miner's disability and coal mine employment. The "rule out" standard had been adopted by the Ninth and Tenth Circuits. *See* ***Rosebud Coal Sales Co. v. Weigand***, 831 F.2d 926, 10 BLR 2-371 (10th Cir. 1987); ***Palmer Coking Coal Co. v. Director, OWCP***, 720 F.2d 1054, 6 BLR 2-11 (9th Cir. 1983). The Fourth Circuit also adopted the "rule out" standard in ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). The Third, Sixth, Eighth and Eleventh Circuits have held that the party opposing entitlement must establish that the miner's pneumoconiosis is not a contributing cause of total disability, in order to establish rebuttal under subsection (b)(3). *See* ***Consolidation Coal Co. v. Smith***, 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988); ***Bernardo v. Director, OWCP***, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986); ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Carozza v. United States Steel Corp.***, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984). It is noted that in ***Kline v. Director, OWCP***, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989), the Third Circuit, citing ***Massey***, ***supra***, stated that it is necessary to "rule out" a possible causal connection between a miner's disability and his coal mine employment. ***Kline***, 877 F.2d at 1179, 12 BLR at 2-354.

In ***Wetherill v. Director, OWCP***, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987), the Seventh Circuit held that the party opposing entitlement must establish that the miner's pneumoconiosis was not a contributing cause of his total disability.

CASE LISTINGS

[blood gas and pulmonary function studies not diagnostic of whether any respiratory impairment shown arises out of coal mine employment; studies alone insufficient to establish rebuttal under subsection (b)(3)] ***Burke v. Director, OWCP***, 3 BLR 1-410 (1981).

[diagnosis that miner's lung function normal and that shortness of breath related to cardiac disease with mild decompensation relevant to (b)(3)] ***Shaneyfelt v. Jones and Laughlin Steel Corp.***, 4 BLR 1-144 (1981).

[Seventh Circuit held rebuttal as matter of law where "no evidence was offered to challenge or contradict a physician's opinion that claimant's disability was due to cigarette smoking" and adjudicator's rejection of opinion improper] ***Peabody Coal Co. v. Lowis***, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983).

[Ninth Circuit held (b)(3) rebuttal must rule out any causal link between disability and coal mine employment] ***Palmer Coking Coal Co. v. Director, OWCP***, 720 F.2d 1054, 6 BLR 2-11 (9th Cir. 1983).

["no" response to DOL form causation question can establish impairment did not arise out of coal mine employment] ***Simpson v. Director, OWCP***, 6 BLR 1-49 (1983).

[adjudicator's failure to consider medical reports under subsection (b)(3) harmless since doctor did not state with any certainty that miner's disability did not arise out of coal mine employment] ***Allen v. Brown Badgett, Inc.***, 6 BLR 1-562 (1983).

[opinions silent concerning cause of diagnosed respiratory condition insufficient to rebut under subsection (b)(3)] ***Allen v. Brown Badgett, Inc.***, 6 BLR 1-567 (1983).

[rebuttal at subsection (b)(3) as matter of law; uncontradicted reports diagnosed smoking as cause, ruled out coal mine employment etiology] ***Jenkins v. Imperial Coal Co.***, 6 BLR 1-631 (1983).

[medical opinion as to cause of opacities on x-ray may be considered on rebuttal] ***Pate v. Alabama By-Products Corp.***, 6 BLR 1-636 (1983).

[diagnosis impairment related solely to heart condition substantial evidence for subsection (b)(3) rebuttal] ***Spradlin v. Island Creek Coal Co.***, 6 BLR 1-716 (1984).

[where adjudicator failed to consider two medical reports that miner totally disabled due to cardiovascular disease and not pulmonary disease required remand] ***Tucker v.***

Eastern Coal Corp., 6 BLR 1-743 (1983).

[Fourth Circuit rejects "reasonable degree of medical certainty" standard enunciated in ***Blevins II*** in favor of a "reasoned medical judgment" standard pronounced in ***Underhill v. Peabody Coal Co.***, 687 F.2d 217, 4 BLR 2-142 (7th Cir. 1982); *see also* ***Peabody Coal Co. v. Lowis***, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); guidelines for assessing weight of physician's opinion attributing a miner's lung disease to smoking rather than coal mine employment established] ***Blevins v. Peabody Coal Co.***, 6 BLR 1-750, 1-755 (1983), *citing* ***Blevins v. Peabody Coal Co.***, 1 BLR 1-1023, 1-1029 (1979)("***Blevins II***").

[diagnosis of respiratory or pulmonary impairment attributed to heart disease properly considered under subsection (b)(3); doctor did not state miner was able to do usual coal mine work or that he suffered no respiratory impairment] ***Cardwell v. Circle B Coal Co.***, 6 BLR 1-788 (1984).

[diagnosis that miner's calcified granuloma not arising out of coal mine employment and not pneumoconiosis relevant to both subsections (b)(3), (4)] ***Jefferies v. Director, OWCP***, 6 BLR 1-1013 (1984).

[adjudicator made medical determination beyond expertise by finding subsection (b)(3) rebuttal where no medical evidence establishes that miner's disability did not arise out of coal mine employment. ***Tinch v. Director, OWCP***, 6 BLR 1-1284 (1984).

[adjudicator's finding subsection (b)(3) rebuttal not established affirmed where diagnoses noted possible coronary disease but none specifically attributed respiratory symptoms to heart disease] ***Newland v. Consolidation Coal Co.***, 6 BLR 1-1286 (1984).

[medical opinion rules out industrial bronchitis as factor in miner's impairment says medical findings inconsistent with pneumoconiosis, attributing miner's impairment to smoking, is substantial evidence to rebut under subsection (b)(3)] ***Strother v. Republic Steel Corp.***, 6 BLR 1-1298 (1984).

[finding *pneumoconiosis* related to coal mine employment has no conclusive bearing under subsection (b)(3) that concerns source of *impairment*] ***Adkins v. Director, OWCP***, 6 BLR 1-1318 (1984).

[subsection (b)(3) not necessarily precluded where adjudicator finds subsection (a)(1) invocation] ***Adkins v. Director, OWCP***, 6 BLR 1-1318 (1984).

[pulmonary function studies, while relevant to presence or absence of respiratory impairment, are not determinative of causation] ***Piniansky v. Director, OWCP***, 7 BLR 1-171 (1984).

[adjudicator's finding of no subsection (b)(3) rebuttal reversed where uncontradicted medical opinions established miner's condition due to smoking] ***Burton v. Drummond Coal Co.***, 7 BLR 1-194 (1984).

[Sixth Circuit held that where pneumoconiosis played no part in causing miner's disability, employer has satisfied requirements of subsection (b)(3)] ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *cert. denied*, 471 U.S. 1116 (1985).

[Fourth Circuit followed ***Carozza***, upholding validity of subsection (b)(3) as written and rejecting ***Jones*** and its progeny; Court held party opposing entitlement "must establish that the miner's primary condition, whether it be emphysema or some other pulmonary disease, was not aggravated to the point of total disability by prolonged exposure to coal dust"] ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

[Eleventh Circuit held under subsection (b)(3), employer must show no part of claimant's disability arose out of coal mine employment] ***Black Diamond Coal Mining Co. v. Benefits Review Board, [Raines]***, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985).

[argument that because coal dust may have caused miner's pancreatic cancer, adjudicator improperly found subsection (b)(3) rebuttal rejected; purpose of Act to provide benefits for respiratory or pulmonary impairment arising out of coal mine employment] ***Brewer v. Bethlehem Mines Corp.***, 7 BLR 1-404 (1984).

[argument that subsection (b)(3), in conjunction with Section 727.202, creates irrebuttable presumption that any totally disabling respiratory impairment due to pneumoconiosis rejected] ***Hoole v. Republic Steel Corp.***, 7 BLR 1-453 (1984).

[Sixth Circuit claim decided under ***Jones*** standard must be remanded for consideration under ***Gibas***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984)] ***Maypray v. Island Creek Coal Co.***, 7 BLR 1-683 (1985).

[diagnosis coal dust exposure played "very minor role" in etiology of impairment may rebut under ***Gibas***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984)] ***Henning v. Peabody Coal Co.***, 7 BLR 1-753 (1985).

[diagnosis attributing part of miner's respiratory impairment to coal mine employment may be sufficient to rebut at subsection (b)(3) if adjudicator determines it meets standards established in ***Carozza*** and ***Killingsworth***] ***Pickett v. Black Diamond Coal Mining Co.***, 7 BLR 1-778 (1985).

[if miner's non-compensable impairment is totally disabling by itself, rebuttal under

subsection (b)(3) possible if compensable impairment not totally disabling; if non-compensable impairment is not totally disabling by itself, rebuttal possible only if pneumoconiosis played no part in causing miner's disability] ***Crisp v. Ligon Preparation Co.***, 7 BLR 1-824 (1985); *see* ***Ramey v. Kentland Elkhorn Coal Corp.***, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

[finding of no rebuttal under ***Jones v. The New River Co.***, 3 BLR 1-199 (1981)[rebuttal under subsection (b)(3) established if pneumoconiosis is not, in and of itself, totally disabling] satisfies ***Carozza*** standard as well] ***Knizner v. Bethlehem Mines Corp.***, 8 BLR 1-5 (1985).

[medical opinions indicating miner's disability due to extreme obesity provide substantial evidence to support finding that disability did not arise in whole or in part out of coal mine employment under ***Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984)] ***Endrizzi v. Bethlehem Mines Corp.***, 8 BLR 1-11 (1985).

[coal dust exposure causes acute episodes of respiratory distress but has not contributed to permanent respiratory disability, subsection (b)(3) rebuttal not precluded] ***Liner v. Drummond Coal Co.***, 8 BLR 1-27 (1985).

[on remand from Third Circuit, Board applied ***Carozza*** to affirm no subsection (b)(3) rebuttal where miner's anthracosilicosis made some contribution to overall disability. ***Murgel v. Consolidation Coal Co.***, 8 BLR 1-29 (1985).

[Sixth Circuit held where no doctors found pneumoconiosis, it could not be contributing cause of miner's disability] ***Moseley v. Peabody Coal Co.***, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985).

[finding of no subsection (b)(3) rebuttal upheld under ***Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), because evidence insufficient to establish miner's pneumoconiosis did not cause disability] ***Hornbarger v. Hawley Coal Mining Corp.***, 8 BLR 1-60 (1985)(Ramsey, C.J., concurring).

[medical report stating miner's cough due to chronic bronchitis does not establish cause of *impairment*; insufficient for subsection (b)(3) rebuttal] ***Aleshire v. Central Coal Co.***, 8 BLR 1-70 (1985).

[absence of blood gas study in record does not preclude subsection (b)(3) rebuttal; adjudicator's finding of subsection (b)(3) rebuttal affirmed where only doctors who addressed respiratory complaints both concluded he did not suffer from respiratory impairment but symptoms caused by heart disease] ***O'Brien v. United States Steel Corp.***, 8 BLR 1-103 (1985); *see also* ***Cooper v. United States Steel Corp.***, 7 BLR 1-842 (1985); ***Pastva v. The Youghiogheny and Ohio Coal Co.***, 7 BLR 1-829 (1985).

[in case arising in Sixth Circuit, Board held evidence that miner's pneumoconiosis operated in conjunction with another pulmonary condition to render miner totally disabled precludes subsection (b)(3) rebuttal] ***Sigers v. Island Creek Coal Co.***, 11 BLR 1-165 (1985).

DIGESTS

The Third Circuit held that subsection (b)(3) is concerned with the source of disability not the degree of disability. ***Bernardo v. Director, OWCP***, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986).

The Fourth Circuit Court reversed the administrative law judge's finding that the employer had not established rebuttal pursuant to (b)(3). The Court, relying on its decision in ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120 (4th Cir. 1984), held that for (b)(3) to be established, the employer must establish that the miner's primary condition was not aggravated to the point of total disability by prolonged exposure to coal dust. Pneumoconiosis contracted through coal mine employment need not be the exclusive causative factor of the miner's total disability and the employer cannot focus solely on the disabling potential of the miner's pneumoconiosis. ***Heffinger v. U.S. Steel***, No. 85-1717 (4th Cir., Nov. 26, 1986)(unpub.).

The Seventh Circuit held that subsection (b)(3) enables an employer to rebut the interim presumption by proving that the miner's pneumoconiosis was not a contributing cause of his total disability. ***Wetherill v. Director, OWCP***, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

The Sixth Circuit, citing ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), held that if an employer is able to prove that pneumoconiosis played no part in causing a miner's disability, then the employer has satisfied the requirements of subsection (b)(3). ***Roberts v. Benefits Review Board***, 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987).

The Fourth Circuit, relying on its decision in ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1985), held that the employer must rule out the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption under subsection (b)(3). The employer must establish the miner's primary condition was not aggravated to the point of total disability by prolonged exposure to coal dust. ***Phillips v. Jewell Ridge Coal Co.***, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987).

The Tenth Circuit held that Section 727.203(b)(3) requires that any relationship between the disability and coal mine employment be ruled out. ***Rosebud Coal Sales Co. v. Weigand***, 831 F.2d 926, 10 BLR 2-317 (10th Cir. 1987).

Although a physician's diagnosis of no pulmonary or respiratory impairment may be insufficient for (b)(2) rebuttal under ***Sykes***, the report is nevertheless relevant under subsection (b)(3). The Board remanded the case for reconsideration of the medical opinion pursuant to (b)(3). ***Marcum v. Director, OWCP***, 11 BLR 1-23 (1987).

Administrative law judge erred where physicians' reports and testimony did not provide substantial evidence that claimant's disability did not arise in whole or in part of coal mine employment. The Sixth Circuit found the Board's construction of the ***Gibas*** decision to be incorrect. ***Warman v. Pittsburg & Midway Coal Mining Co.***, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).

In the Sixth Circuit, the Board will apply the standard enunciated in ***Warman v. Pittsburg and Midway Coal Mining Co.***, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988) and ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 1120, 7 BLR 2-53, 2-65 (6th Cir. 1984) for establishing (b)(3) rebuttal, *i.e.*, that the party opposing entitlement must prove that pneumoconiosis played no part in causing claimant's disability. ***Michael v. James Spur Coal Co.***, 11 BLR 1-78 (1988)(Tait, J., concurring).

The Eighth Circuit held that the administrative law judge erred in finding rebuttal established at Section 727.203(b)(3), as not one of the doctors who submitted reports stated that the miner's anthracosis was not a contributing factor to his disability or death. ***Consolidation Coal Co. v. Smith***, 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988).

The Board held that a diagnosis of cor pulmonale may be relevant in determining the cause of a miner's disability (*i.e.*, it may be indicative that the disability was caused by pneumoconiosis). ***Christian v. Monsanto Corp.***, 12 BLR 1-56 (1988).

In an en banc reconsideration, the Board distinguishes the difference between the burdens to rebut and establish cause of disability under Sections 727.203(b)(3) and 718.204(b). ***Hutson v. Freeman United Coal Mining Co.***, 12 BLR 1-72 (1988)(en banc).

In ***Borgeson III***, the Board overruled its decisions in ***Borgeson II*** and ***Shaw v. Bradford Coal Co.***, 7 BLR 1-462 (1984), and adopted a subsection (b)(3) standard consistent with the standards articulated by the various circuit courts of appeal. In order to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any relationship between the miner's total disability and coal mine employment. ***Borgeson v. Kaiser Steel Corp.***, 12 BLR 1-169 (1989)(en banc).

The Eleventh Circuit held that the employer must show that no part of the miner's disability arose out of coal mine employment in order to establish rebuttal at Section 727.203(b)(3). Even where pneumoconiosis is only a contributing cause of the miner's total disability, benefits must be awarded as long as no other grounds for rebuttal has

been established. ***Thomas v. United States Steel Corp.***, 843 F.2d 503, 12 BLR 2-243 (11th Cir. 1988).

The Third Circuit, citing ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir 1984), held that it is necessary to "rule out" a possible causal connection between a miner's disability and his coal mine employment. ***Kline v. Director, OWCP***, 877 F.2d 1175, 1179, 12 BLR 2-346, 2-354 (3d Cir. 1989).

The Board rejected claimant's contention that the physician's checking the "no" box on the Department of Labor physical examination Form 988 cannot support Section 727.203(b)(3) rebuttal under ***Warman v. Pittsburgh and Midway Coal Mining Co.***, 829 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). ***Hall v. Director, OWCP***, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989).

To rebut, the party must establish by persuasive evidence that the miner has neither clinical pneumoconiosis nor presumed pneumoconiosis. ***Pavesi v. Director, OWCP***, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); ***Campbell v. Consolidation Coal Co.***, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); ***Chastain v. Freeman United Coal Mining Co.***, 919 F.2d 485, 14 BLR 2-130, (7th Cir., 1990), *pet. for reh'g denied,* 927 F.2d 969 (7th Cir. 1990).

The ***Blevins*** test is applicable to rebuttal under subsection (b)(4). ***Chastain v. Freeman United Coal Mining Co.***, 919 F.2d 485, 14 BLR 2-130, (7th Cir., 1990), *pet for reh'g denied*, 927 F.2d 969 (7th Cir. 1990).

Inasmuch as the Board vacated the administrative law judge's award of benefits pursuant to Section 410.490, in this case involving a miner with in excess of ten years of coal mine employment, the Board remanded the case to the administrative law judge to consider whether rebuttal was established pursuant to Section 727.203(b)(3) under the standards enunciated in ***Bernardo v. Director, OWCP***, 790 F.2d 351, 9 BLA 2-26 (3d Cir. 1986) and ***Carozza v. U.S. Steel Corp.***, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984), in this case arising within the Third Circuit. ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991)(en banc).

The Board applies the holding of the Supreme Court in ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991) and its holding in ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991) (en banc), holding that Section 727.203 (b)(3) rebuttal is a viable means of defeating entitlement at Section 727.203.

The U.S. Supreme Court upheld as valid the rebuttal provisions at 20 C.F.R. §727.203(b)(3) and (b)(4). ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991).

In light of the United States Supreme Court's decision in ***Pauley v. Bethenergy Mines,***

Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), the Board recognized that subsection (b)(3) (as well as subsection (b)(4)) is available to establish rebuttal in cases arising within the jurisdiction of the Seventh Circuit. Although this decision overrules the Board's holding with regard to the application of subsections (b)(3) and (b)(4) in acknowledging ***Pauley***, the Board's previous affirmation of the administrative law judge's award of benefits was affirmed on reconsideration. ***Berta v. Peabody Coal Co.***, 16 BLR 1-69 (1992), *affirming on recon.*, 14 BLR 1-126 (1990).

The Board agreed to reverse the administrative law judge's Section 727.203(b)(3) finding that rebuttal was established, and therefore overrule its previous published decision, ***Johnson v. Old Ben Coal Co.***, 17 BLR 1-1 (1992), and hold that its prior ruling under ***Turner v. Director, OWCP***, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991), is inconsistent with ***Malcomb v. Island Creek Coal Co.***, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), which was issued subsequent to the Board's 1992 decision in this case. A comparison of the facts in ***Malcomb***, ***Turner***, and ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), and ***Johnson***, *supra*, led the panel to agree that the mere mention of a smoking history by an examining physician did not sufficiently address the "matter" so as to provide a proper basis for reliance on the opinion of a non-examining physician who found that claimant's disability was due to smoking rather than coal mine employment. The Board therefore reversed on the foregoing basis. ***Johnson v. Old Ben Coal Co.***, 19 BLR 1-103 (1995), *overruling* ***Johnson v. Old Ben Coal Co.***, 17 BLR 1-1 (1992)[Board noted that its holding in ***Kittle v. Badger Coal Co.***, 5 BLR 1-474 (1982), was **overruled** insofar as inconsistent].

The opinion of a physician that the miner's total disability was due to smoking was legally insufficient to meet employer's burden under 20 C.F.R. §727.203(b)(3) and ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) to establish that pneumoconiosis played no role in causing the miner's disability. ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

The Seventh Circuit affirmed the administrative law judge's award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur's opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers' opinion to be too equivocal to carry employer's burden. The Seventh Circuit reversed the administrative law judge's onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that

the sixteen-year delay in adjudicating this claim deprived employer of its right to due process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice to employer despite this delay. ***Amax Coal Co. v. Director, OWCP* [*Chubb*]**, 312 F.3d 882 (7th Cir. 2002).

The Board rejected employer's assertion that the Fourth Circuit, in ***Milburn Colliery Co. v. Hicks***, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and ***Dehue Coal Co. v. Ballard***, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), has adopted the holding of the Seventh Circuit, in ***Freeman United Coal Mining Co. v. Foster***, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), and ***Peabody Coal Co. v. Vigna***, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), that a claimant is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems, if he suffers from a pre-existing nonrespiratory disability. ***Bateman v. Eastern Associated Coal Corp.***, 22 BLR 1-255 (2003).

The Seventh Circuit held that, under the interim regulations, a miner cannot recover benefits if he is totally disabled by an unrelated, nonpulmonary condition, notwithstanding his probable pneumoconiosis. In this case, the record demonstrated that the miner's total disability was caused by his blindness in 1976, prior to his presumed disability due to pneumoconiosis. Because it was undisputed that the miner was forced to stop working because of blindness, not black lung disease, the Seventh Circuit held that recovery was precluded under 20 C.F.R. §727.203(b)(3). ***Gulley v. Director, OWCP***, 397 F.3d 535 (7th Cir. 2005).

05/05